

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 10, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2017AP2000-CR

Cir. Ct. No. 2016CT525

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

MISTY DAWN DONOUGH,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHELLE ACKERMAN HAVAS, Judge. *Affirmed.*

¶1 KESSLER, P.J.¹ Misty Dawn Donough appeals a judgment of conviction, following a no contest plea, of one count of operating a motor vehicle while intoxicated. We affirm.

BACKGROUND

¶2 On March 10, 2016, Donough was charged with one count of operating a motor vehicle while intoxicated, second offense, and one count of operating with a prohibited alcohol concentration, second offense. According to the criminal complaint, on February 15, 2016, Deputy Jennifer Moldenhauer of the Milwaukee County Sheriff's Department, observed a disabled vehicle on a Milwaukee interstate. Moldenhauer made contact with Donough, pushed the vehicle off of the interstate, and then made contact with Donough again. Moldenhauer noticed that Donough was glassy-eyed, slurring her speech, and smelled of alcohol. Donough performed poorly on field sobriety tests and showed a .251 blood alcohol concentration on a breathalyzer test. Donough was arrested and subsequently charged.

¶3 Donough filed a motion to suppress evidence, arguing that Moldenhauer lacked reasonable suspicion to arrest her. Donough argued that Moldenhauer had multiple interactions with Donough when helping Donough with her vehicle in which Donough did not appear intoxicated.

¶4 At a hearing on the motion, Moldenhauer testified that on February 15, 2016, at approximately 1:35 p.m., Moldenhauer and her training officer

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

noticed a disabled vehicle at an interstate off-ramp. Moldenhauer drove over to the disabled vehicle and positioned her squad car behind the vehicle. While Moldenhauer was approaching the vehicle, Donough got out of the vehicle and was on her cell phone. Moldenhauer stated that she was standing several feet away from Donough. Moldenhauer began asking Donough questions about the vehicle and asked Donough if she could put her car in neutral “because the plan was to push it out of traffic onto the side of the street.” Donough remained on her phone during Moldenhauer’s questioning and “kind of turn[ed] her back to [Moldenhauer],” but stated that she could put the car in neutral. Donough returned to her vehicle, Moldenhauer instructed Donough on how to maneuver her vehicle so that Moldenhauer could push it with her squad car, and Donough closed her door. At that point, Donough’s passenger exited the disabled vehicle. Moldenhauer testified that the passenger stumbled toward the back of the vehicle. Moldenhauer instructed the passenger to return to the vehicle. The passenger then stumbled back into the vehicle. Moldenhauer then returned to her squad car and pushed Donough’s disabled vehicle off the interstate.

¶5 Moldenhauer stated that after she pushed Donough’s vehicle off the interstate and onto a side street, Moldenhauer re-approached Donough’s vehicle and asked Donough for her driver’s license and insurance information. Moldenhauer observed that Donough’s eyes were glassy and she smelled alcohol. Moldenhauer returned to her squad car and told her training officer that she believed Donough was intoxicated. The training officer told Moldenhauer to re-approach Donough’s vehicle to gather more information. Moldenhauer returned to Donough’s vehicle and again noticed that Donough appeared glassy-eyed and smelled of alcohol. Moldenhauer stated that was “[t]he first time [she] had got that close to [Donough.]” Moldenhauer returned to her squad car and confirmed

with her training officer that she believed Donough was intoxicated. Moldenhauer then asked Donough to perform field sobriety tests.

¶6 The circuit court denied Donough’s motion to suppress. Donough subsequently pled no contest to operating while intoxicated as a second offense. This appeal follows.

DISCUSSION

¶7 On appeal, Donough contends that Moldenhauer lacked reasonable suspicion that Donough was operating while intoxicated because Moldenhauer concluded her interaction with Donough but then returned to Donough’s vehicle to investigate whether Donough was intoxicated. Specifically, Donough argues that before asking Donough to perform field sobriety tests, Moldenhauer: “[spoke] to [Donough] more than once,” instructed Donough to steer her vehicle off of the interstate, listened to Donough call a tow truck, “watched [Donough] perfectly perform[] the officer’s instructions on exactly where to park her disabled vehicle out of traffic,” and then bid Donough farewell “before returning to the squad car.” (Bolding and capitalization omitted.) Donough frames the issue as whether an officer “may later re-approach the vehicle and ask the motorist to perform field sobriety tests based only on the odor of an intoxicant emanating from the interior of the vehicle where the motorist’s passenger also sat throughout the duration of the officer’s assistance.” (Bolding and capitalization omitted.) In essence, Donough argues that Moldenhauer lacked reasonable suspicion to believe that Donough operated her vehicle while intoxicated.

¶8 In reviewing a motion to suppress evidence, we apply a two-step standard of review. *See State v. Eason*, 2001 WI 98, ¶9, 245 Wis. 2d 206, 629 N.W.2d 625. We will uphold the circuit court’s findings of historical fact unless

they are clearly erroneous. *See id.* We then review the application of constitutional principles to those facts *de novo*. *See id.*

¶9 A lawful traffic stop may be extended if a law enforcement officer “becomes aware of additional suspicious factors which are sufficient to give rise to an articulable suspicion that the person has committed or is committing an offense or offenses separate and distinct from the acts that prompted the officer’s intervention in the first place.” *State v. Colstad*, 2003 WI App 25, ¶19, 260 Wis. 2d 406, 659 N.W.2d 394 (citation omitted). We must ask whether a reasonable police officer would, in light of his or her training and experience, draw an inference of suspicious conduct under the totality of the facts and circumstances. *See State v. Post*, 2007 WI 60, ¶13, 301 Wis. 2d 1, 733 N.W.2d 634. By contrast, an officer’s inchoate and unparticularized suspicion, or hunch, is insufficient under this standard. *Id.*, ¶10. We do not distinguish or dismiss factors as innocent in isolation when evaluating reasonable suspicion. *See State v. Waldner*, 206 Wis. 2d 51, 58-59, 556 N.W.2d 681 (1996).

¶10 Here, Donough does not contest that the initial seizure was lawful. The parties agree that Moldenhauer acted in a community caretaker function when she noticed Donough’s disabled vehicle and approached Donough to assist her. Rather, she implies that Moldenhauer unlawfully extended the otherwise lawful traffic stop because Moldenhauer concluded her interaction with Donough after moving Donough’s vehicle, but then returned to Donough’s vehicle to investigate whether Donough was intoxicated.

¶11 Donough’s argument ignores the facts in the record. According to Moldenhauer’s testimony, Moldenhauer only came into close contact with Donough after Moldenhauer approached Donough’s vehicle to obtain Donough’s

driver's license and insurance information. Prior to approaching Donough's vehicle, Moldenhauer and Donough only interacted with each other at a distance. It was only after pushing Donough's car off of the interstate that Moldenhauer approached the vehicle and came into close enough contact with Donough to notice the smell of alcohol and Donough's glassy eyes. At that point, Moldenhauer told her training officer that Donough appeared intoxicated and the officer suggested that Moldenhauer return to the vehicle to obtain additional information. Moldenhauer approached Donough again and again noticed Donough's glassy eyes as well as the smell of alcohol on Donough herself. Contrary to Donough's contention, Moldenhauer stated that she smelled alcohol emanating from Donough—not simply from Donough's vehicle.

¶12 Based on the totality of the facts and circumstances of this case, the extended stop was reasonable. Moldenhauer testified as to specific and articulable facts that suggested Donough was operating her vehicle while intoxicated. Moreover, the circuit court found Moldenhauer credible. We give deference to the circuit court's credibility determinations. *See Johnson v. Merta*, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980); see also WIS. STAT. § 805.17(2).

¶13 For the forgoing reasons, we affirm.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

